**TRADEBOND (M) SDN BHD**

**v.**

**HALIM-O CONSTRUCTION SDN BHD**

HIGH COURT MALAYA, KUALA LUMPUR
VINCENT NG J
[COMPANIES (WINDING-UP) NO: D1-28-854-2003]
1 MARCH 2005

***COMPANY LAW:*** *Winding up - Disposition of property - Validation order - Companies Act 1965, s. 223 - Requirements to secure a validation order - Whether satisfied - Whether company grievously impaired without validation order as sought - Interests of creditors - Validation order sought for payment of legal charges - Pari passu rule*

The respondent had applied for a validation order pursuant to s. 223 of the Companies Act 1965 ('the Act') to utilise monies standing to its credit in Bumiputra Commerce Bank. The court had allowed certain payments but disallowed payments to incoming suppliers, subcontractors and service providers for existing and future projects and other unspecified expenses incurred for day to day running of respondent company. The respondent is a company actively carrying out construction works and ongoing construction projects. The petitioner's solicitors, upon filing the winding up petition, caused the respondent's bankers to freeze all of the respondent's accounts. It was submitted by the respondent that the petition was without any basis, and its business was in need of money to enable works to be carried out. The petitioner submitted that the respondent had failed to show that payments to 93 supporting creditors were essential for the survival of the respondent's business.

**Held:**

**[1]** It is trite law that the purpose of s. 223 is to protect the interest of creditors when a petition for winding up is presented. The court cannot exercise its discretion to make a validation order if the result of the order is to make one or more creditors being paid in full at the expense of other creditors *(Kimoyama Elektrik (M) Sdn Bhd v. Metrobilt Construction Sdn Bhd).* (p 97 b)

**[2]** The court will always have regard as to whether the disposition referred to s. 223 of the Companies Act was made *bona fide* in the course of the company's current trade, and if not validated, the trade of the company would be paralysed without any advantage *(BSN Commercial Bank (M) Bhd v. River View Properties Sdn Bhd).* Further, the court must look into the importance of the payments sought to be validated *vis a vis* the respondent's business and whether the company would be paralysed if validation was refused. (p 97 c & d)

**[3]** Here, the court did not allow payment to incoming suppliers, sub contractors and service providers for existing and future projects (item 3) and any other unspecified expenses incurred for the day to day running of Halim-O Construction Sdn Bhd (item 8) because the applicant did not satisfy the following essential requirements, which must be met in toto, in order to secure a validation order: (i) in respect of amounts alleged to be owing, to condescend upon cogent evidence that the amount is due and owing; (ii) in respect of amounts envisaged to be due to suppliers, subcontractors and service providers, to explain how the payments are intimately related to the day to day running in the company's operations; (iii) if not paid the consequences would grievously affect and impinge on the day to day running and survival of the company; and (iv) should be allowed on an urgent basis. The respondent had not condescended upon any particulars or documentary proof to meet the requirements in (i) to (iv) above. (p 98 d-g)

**[4]** The respondent had failed to show that these payments should be allowed on an urgent basis as the contracts would be terminated by the parties awarding the contract. There was no cogent documentary proof to show that the various amounts were due, and least of all, that the company's trade would be grievously impaired without the validation order as sought. Thus, a prospective order ahead of a winding up petition validating any payments to the respondent contractors would put the disposition of its property in so far as it relates to payments which they are not entitled to, beyond the reach of the liquidators thereby defeating the objective of the winding up. (p 99 f-g)

**[5]** The respondent also sought a validation order for payment of legal charges and disbursements. In declining to allow this feature of disbursements, the court adopted the reasoning in *Tan Kah Hoe & Anor v. Budaya Adil Sdn Bhd* who rightly held that the solicitors had full knowledge of the winding up petition before accepting the brief in respect of the case. And, that if leave was granted, it would have the effect of paying the

respondent's firm of solicitors, who was essentially a creditor, in full, thereby securing the firm an advantage over the rest of the creditors. It was rightly held that this was against the *pari passu* rule, and that any benefit accruing to the creditors pre-supposed the success of the litigation. In the absence of *prima facie* case, it was unreliable speculation. Furthermore, the respondent herein had failed to show any professional bill or amount that is being claimed, which makes their request very speculative and they should not be allowed to rank in priority to other creditors. (pp 99 h & 100 a)

*[Order accordingly.]*

**Case(s) referred to:**

*BSN Commercial Bank (M) Bhd v. River View Properties Sdn Bhd [1996] 1 CLJ 307 HC* ***(refd)***

*George Kent (Malaysia) Bhd v. Gopeng Construction Sdn Bhd [2003] 7 CLJ 19 HC* ***(refd)***

*Kimoyama Elektrik (M) Sdn Bhd v. Metrobilt Construction Sdn Bhd [1990] 2 CLJ 795; [1990] 2 CLJ (Rep) 253 HC* ***(refd)***

*Re Clifton Place Garage Ltd [1969] 3 All ER 892* ***(refd)***

*Re Gray's Inn Construction Co Ltd [1980] 1 All ER 814* ***(refd)***

*Re Steares (Bournemouth) Ltd [1950] 1 All ER 21* ***(refd)***

*Tan Kah Hoe & Anor v. Budaya Adil Sdn Bhd [1999] 4 CLJ 759 HC* ***(foll)***

**Legislation referred to:**

Companies Act 1965, s. 223

*For the applicant/respondent - Jacob Goldie; M/s Jacob Goldie & Toh*

*For the respondent/petitioner - S Dhanaraj (Pamela Edward Ephraim with him); M/s Hakem Arabi & Assoc*

*Reported by Suhainah Wahiduddin*

## JUDGMENT

**Vincent Ng J:**

At the meeting of the High Court Judges on 7 November 2003 (which led to 7 November 2003 resolution on the disposal of pre-2000 cases) it was agreed that the grounds of judgment on affidavit-based decisions need not be prepared. However, in order to facilitate quick appreciation of the relevant issues and the crux of the rationale of the decision, I have prepared the following short formatted grounds.

**Preamble**

The respondent had applied (*vide* encl. 5) for a validation order pursuant to s. 223 of the Companies Act 1965 (the Act) to utilise monies standing to its credit in Bumiputra Commerce Bank.

By consent on 21 October 2003 I had granted an interim order pending the hearing of the petition (encl. 1) pursuant to the same provision of the Act to enable the respondent to utilize monies standing to its credit in Bumiputra Commerce at Lot G-01, Kompleks Teruntum, 2500 Kuantan, Pahang Darul Makmur *vide* account number 0612-0003598-05-7, 0612-0003578-05-6, and 0612-0001957-95-8 for payments for the purposes and persons mentioned as follows:

(1) All payments to insurers.

(2) Payment for financial and bank charges.

(3) Payment of wages, allowances, charges to all existing and future staff, employees and officers of the company.

(4) Payment of all water, electricity and telephone charges.

(5) Payment to EPF and SOCSO.

On 12 November 2003, I further allowed certain other payments for disbursements, and disallowed payment to incoming suppliers, sub-contractors and service providers for existing and future projects and also other unspecified expenses incurred for day to day running of respondent company.

**Respondent's Case**

The respondent is a company actively carrying out Construction Works and has ongoing Construction Projects. The petitioner's solicitors have, by letter dated 4 September 2003 and upon filing the winding-up petition, caused the respondent's bankers to freeze all of the respondent's accounts. It is submitted by the respondent that the petition is without any basis, and its business is in need of money to enable works to be carried out.

**Petitioner's Case**

It is submitted by the petitioner that the respondent has failed to show that payments to 93 supporting creditors for a substantial sum of RM651,651,87 is essential for the survival of the respondent's business as a going concern and need to be made on an urgent basis.

**Issue**

Whether payment to incoming suppliers, sub-contractors and service providers for existing and future projects should be sanctioned.

**The Law**

Section 223 of the Companies Act 1965 states that:

> **Any disposition of property of the Company including things in action** and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up petition by the court unless the court otherwise orders to be void. (emphasis added)

(a) It is trite law that the purpose of s. 223 is to protect the interest of creditors when a petition for winding-up is presented. The court cannot exercise its discretion to make a validation order if the result of the order is to make one or more creditors being paid in full at the expense of other creditors (see *Kimoyama Elektrik (M) Sdn Bhd v. Metrobilt Construction Sdn Bhd* [1990] 2 CLJ 795; [1990] 2 CLJ (Rep) 253), or the general body of creditors. See *Re Gray's Inn Construction Co Ltd* [1980] 1 All ER 814.

(b) The court will always have regard as to whether the disposition referred to s. 223 of the Companies Act was made *bona fide* in the course of the company's current trade, and if not validated, the trade of the company would be paralysed without any advantage (as established in *BSN Commercial Bank (M) Bhd v. River View Properties Sdn Bhd* [1996] 1 CLJ 307).

(c) It was emphasised that the court must look into the importance of the payments sought to be validated *vis-à-vis* the respondent's business, and whether the company would be paralysed if validation is refused (see *Re Steares (Bournemouth) Ltd* [1950] 1 All ER 21).

(d) The court must also consider whether the act was done reasonably and in good faith for the benefit of the company (see *Re Clifton Place Garage Ltd* [1969] 3 All ER 892).

(e) Payments to be made to the contractors as and when they are due pursuant to contractual obligations before the commencement of the winding-up, and payments which have to be made for the day to day running expenses of Respondent company do not come within the contemplation of s. 223 of the Act (see *Kok Fong Sang v. Juta Villa (M) Sdn Bhd & Ors (Mallal Digest on Companies and Corporations)*).

(f) It would seem that the courts would normally sanction the disposition under s. 223 Companies Act notwithstanding the opposition of a petitioning contributory where the company is clearly solvent and still trading. Thus, the fact that a validation order may cause preferential payment is not to be taken as the sole consideration when granting a validation order in favour of a highly solvent respondent company. What is important is the ongoing business and the financial position of the respondent company (see *George Kent (Malaysia) Bhd v. Gopeng Construction Sdn Bhd* [2003] 7 CLJ 19).

**Decision**

Applying the above settled law to the facts of the current case I find that with the freezing of the respondent's bank account, payments for items mentioned in the interim order dated 21 October 2003 and order dated 12 November 2003 (on item 7, namely 'payment of disbursements'), would adversely affect the respondent company as an ongoing business and I have thus allowed certain day to day disbursements and normal running expenses to keep the respondent afloat. However, after careful consideration and based in alia on guidelines (a) and (b) above, I decided not to allow the following two items prayed for:

Item 3: Payment to incoming suppliers, sub-contractors and service providers for existing and future projects.

Item 8: Any other (unspecified) expenses incurred for the day to day running of Halim-O Construction Sdn Bhd.

In my view, the applicant has to, but did not satisfy any of the following essential requirements, which must be met in toto, in order to secure a validation order on items 3 and 8, namely:

(i) In respect of amounts alleged to be owing, to condescend upon cogent evidence that the amount is due and owing;

(ii) in respect of amounts envisaged to be due to suppliers, subcontractors and service providers, to explain how the payments are intimately related to the day to day running in the company's operations;

(iii) if not paid the consequences would grievously affect and impinge on the day to day running and survival of the company; and

(iv) should be allowed on an urgent basis.

The crux of the reason why I did not allow the abovementioned items is because the respondent in the petition has not condescended upon any particulars or documentary proof to meet the requirements in (i) to (iv) above. To allow this would defeat the object of a winding-up petition and invariably there will be no money left for the petitioner to make a claim against the respondent.

The respondent has listed down 87 suppliers (creditors), at p. 4 of exh. "NG1", to whom a total sum of RM504,996.38 is due. And, at p. 100 of exh. "NG1" the respondent has alleged that payment of RM146,655.49 in aggregate was due to 6 sub-contractors (creditors) for the month of October 2003 for certain project works. Thus, there are 93 creditors and the total amount that the respondent is seeking to be released under the validation order is in the sum

of RM651,651.87. The petitioner's claim against the respondent in this winding-up petition is for the sum of RM224,109.25 also arising out of the petitioner's appointment as a sub-contractor to carry out road works for a project known as "Rancangan Bekalan Air Bukit Tinggi, Bentong, Pahang". It must thus be noted that petitioner's claim is in the same league as the 6 subcontractors.

In the case of *Kimoyama Elektrik (M) Sdn Bhd v. Metrobilt Construction Sdn Bhd* [1990] 2 CLJ 795; [1990] 2 CLJ (Rep) 253 Zakaria Yatim J (as he then was) had expressed the following views:

> … it can be concluded that under s. 223 of the Companies act, the disposition of the property of the company after a winding up petition has been presented is void unless the court makes a validating order. The purpose of the section is to project the interests of creditors when a petition for winding up is presented. The court, however has the discretion whether or not to make a validating order. The court cannot exercise its discretion to make a validating order if the result of the order is to make one or more creditors being paid in full.

The learned Justice Zakaria Yatim had also referred to the case of *Re Gray's Inn Construction Ltd* [1980] 1 All ER 814 whereby Buckley LJ had this to say:

> Since the policy of the law is to procure as far as practicable rateable payments of the unsecured creditor's claim, it is, in my opinion, clear that the court should not validate any transaction which might result in one or more pre liquidation creditors being paid in full at the expense of other creditors.

The respondent has also failed to show that these payments should be allowed on an urgent basis as the contracts would be terminated by the parties awarding the contract. There is no cogent documentary proof to show that the various amounts were due, and least of all, that the company's trade would be grievously impaired without the validation order as sought. Thus, a prospective order ahead of a winding up petition validating any payments to the respondent contractors would put the disposition of its property in so far as it relates to payments which they are not entitled to, beyond the reach of the liquidators thereby defeating the objective of the winding up.

The respondent has also sought a validation order for payment of legal charges and disbursements. In declining to allow this feature of disbursements I need to do no more than adopt the reasoning of Steve Shim J (as he then was) in the case of *Tan Kah Hoe & Anor v. Budaya Adil Sdn Bhd* [1999] 4 CLJ 759, who rightly held that the solicitors had full knowledge of the winding up petition before accepting the brief in respect of the case. And, that if leave was granted it would have the effect of paying the respondent's firm of

solicitors, who was essentially a creditor, in full, thereby securing the firm an advantage over the rest of the creditors. It was rightly held that this was against the *pari passu* rule, and that any benefit accruing to the creditors pre-supposed the success of the litigation. In the absence of *prima facie* case, it was unreliable speculation. Furthermore, the instant respondent had failed to show any professional bill or amount that is being claimed, which makes their request very speculative and they should not be allowed to rank in priority to other creditors.

In postlude, I must say that, as I have dismissed the winding-up petition (pending the determination of which the validation order was sought) on 23 September 2004, I am unable to fathom why the respondent has now sought to pursue its appeal to the Court of Appeal on this decision and incur the court's expenditure in valuable time.